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IN THE

Supreme Court of the United States

OF THE

OCTOBER TERM, 1944

No. 439

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation,

Petitioner,

vs.

CHARLES F. REYNOLDS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Attorneys for Petitioner

To the Honorable the Supreme Court of the United States:

The petitioner, Salt River Valley Water Users' Association, a corporation organized under the laws

of the State of Arizona, with its principal place of business at Phoenix, in said State, prays that a writ of certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on the Thirtieth day of June, 1944, (R. 331-332) reversing the judgment of the District Court of the United States for the District of Arizona, dated the Twenty-fourth day of September, 1943. (R. 318, 321).

SUMMARY STATEMENT OF MATTER INVOLVED

This action was commenced (R. 1-11) in the District Court of the United States for the District of Arizona, on May 25, 1942, by respondents, totaling 105 in number, against petitioner, herein, Salt River Valley Water Users' Association, a corporation, to recover claimed over-time compensation and liquidated damages due them under the provisions of the Act of June 25, 1938, 52 Stat. 1060; 29 U.S.C.A. Sec. 201-219, known as the "Fair Labor Standards Act of 1938". Of said total of 105, 37 of said respondents are or were employed by petitioner in the capacity of zanjeros; 8 in the capacity of pump operators, and 60 as maintenance men. (R. 2-3, setting forth names of specific respondents employed in each such capacity).

To the end that this Court may have before it the correct factual situation for its assistance in the determination of the ultimate issue involved, i.e: Whether respondents, in the performance of their several duties as employees of petitioner, are engaged in commerce, or in the production of goods for commerce within the scope of the Act above cited, we deem it

necessary to set forth, perhaps at greater length than would otherwise be justified, the reasons for petitioner's corporate existence, the functions discharged by it, and relation thereto of respondents.

The Salt River Valley, located in central Arizona with the city of Phoenix as its heart, is by nature an arid region. To support life for its inhabitants, from prehistoric times until the present, water must be procured from the scanty and intermittent streams of that area, namely, the Salt River and its tributaries, for the irrigation of the fertile lands encompassed therein. Prior to the turn of the present century and for some time thereafter, this was accomplished through the exertions of the individual landowners, in diverting by means of brush or other crude dams, water from the Salt River at such times at it existed therein, and conveying the same comparatively short distances to the lands upon which it was beneficially applied. Said River and its tributaries being then uncontrolled by any effective means, at times of high water such makeshift dams washed out, and long ere they could be repaired or replaced, the water was gone. Furthermore, there being no works for storage, water could not be accumulated against periods of drouth, and the pioneer farmers of the region led a most precarious existence. To construct the great dams and reservoirs required to overcome such conditions was utterly beyond the financial means of the residents of the area until the passage in 1902 by the Congress of the National Reclamation Act (32 Stat. 388, 43 U.S.C.A. 309). Under this Act, the Salt River Project, including Roosevelt Dam, was constructed by the Bureau of Reclamation, Department of the Interior, and operated by it as a Federal Reclamation

Project until November 1, 1917, under a contract between the United States and petitioner such operation was turned over to petitioner (R. 182). However, until repayment to the Federal government of the many millions of dollars advanced by it in the construction of Roosevelt Dam and the Salt River Project in general ,title to all dams and project works remains in the United States, "and until otherwise provided by Congress." 43 U.S.C.A. Sec. 498.

The theory of the National Reclamation Act was the reclamation and development of the public domain of the United States, and in attempting to render its benefits available to the lands situate within the present Salt River Project difficulty was encountered by reason of the fact that most of the lands therein at the time of the passage of said Act were in private ownership. In undertaking a project of such magnitude it was obviously impractibale, if not impossible, for the Federal government to deal with many thousands of private landowners, and, at the instance of such government, petitioner corporation, Salt River Valley Water Users' Association, was incorporated in 1903 under the laws of the Territory of Arizona. Its Articles of Incorporation (Defendant's Exhibit A-R182, 183-226) set out in detail the objects, purposes and powers of petitioner Association. Although incorporated under the general corporation laws of the Territory (later State) of Arizona, in many respects petitioner is unique among corporations, both Arizona and elsewhere. The nature, function, powers, and legal status have frequently been before the Supreme Court of Arizona, which has declared petitioner to be:

"A mutual irrigation district, quasi-public in

character." (Orme v. Salt River Valley Water Users' Assn., 25 Ariz. 324; 217 P. 935).

"A private corporation with a public purpose and having quasi-governmental powers." (Citrus Growers Dev. Assn. v. Salt River Valley Water Users' Assn., 34 Ariz. 105; 268 P. 773).

"It is a unique entity carrying on its business of both a public and private character under two kinds of authority: One obtained from this state, and the other through contract with the government and its stockholders. So, it is seen that it is impossible to apply to the association's business and problems only the powers it obtained by its charter, or the powers, rights and duties conferred on it by its contracts with the government. If it is to be permitted to continue to exercise the powers and privileges necessary to an efficient operation, it cannot be classified and governed as either a private or a public corporation. It really is exercising to a large degree the powers of an irrigation district of the kind that may be organized under the irrigation laws of the state, especially in the matters of taxation and bond issues and in the election of its officers by popular vote. As is said in the Orme case, supra, it is 'a mutual irrigation district'. It was really and in fact organized to secure irrigation water for the lands of its members, under such terms and conditions as the Reclamation Act empowered the Secretary of the Interior to prescribe; and its powers and duties are largely those conferred and imposed by the Secretary in the contract with the association and its members as

set out in its charter." (Saylor v. Gray, 41 Ariz. 558; 20 P. (2d) 441.

Although in its Articles, By-Laws and in common useage, the constituent members of petitioner are referred to as "shareholders" and "stockholders" this, perhaps, is a misnomer. (R. 229 Under petitioner's Articles of Incorporation (Dft's. Exhibit A,—R. 183-226, such "shares" or "stock" are owned by and forever appurtenant to the land represented thereby—not by the individuals who for the time being possess such land. Under said Articles, (Exhibit A—Article V, R. 191-199), every transfer of the title to any lands to which such rights and stock are appurtenant, whether by grant or by operation of law, ipso facto operates as a transfer of all rights to the use of water for the irrigation of said lands, and all rights arising from, or incident, to, the ownership of such stock, as well as the stock itself, to the grantee or successor in title. R. 195-196). In corporate elections each shareholder is entitled to one vote for each acre of land to which appurtenant, not to exceed in the aggregate 160 votes. (R. 203). Petition's revenues are derived: (1) From income arising from the sale, lease, or otherwise furnishing electric or other power or power privileges; (2) from the delivery of water for irrigation, and (3) from assessments levied upon its shareholders, necessary to cover the cost of construction, improvement, enlargement, betterment, repairs, operation and maintenance of the irrigation and other works of the Association. (R. 215). The method of arriving at such assessments, and the collection thereof, are set forth in detail in the Articles. (Dft's Exhibit A. (Art. XIII), R. 215-221). No dividends are, or can be, declared by petitioner and paid its

"stockholders" or "shareholders" as in the case of the ordinary corporation. Such shareholders benefit or profit from their membership in petitioner Association only as water for the irrigation of their lands may by the existence and functions of petitioner, be developed, stored and delivered at a cost within their ability to pay.

Upon the delivery by petitioner of such irrigation water to th elands of the shareholder entitled thereto it has no further jurisdiction or control over it, or the use made thereof by such shareholder. Furthermore, petitioner has nothing to do with the crops grown by such shareholder, or the disposition made thereof by him—whether consumed by such shareholder, sold by him in local and intra-state commerce, or in interstate commerce.

Briefly stated, the duties of such of respondents as are denominated "zanjeros" consist of receiving water "orders" from petitioner's shareholders within their particular district. Each zanjero totals the "orders" for his particular district or division daily, and communicates such total to one of four Watermasters, who colate all such water "orders" and an amount of water necessary to cover these is released from the lowest (Stewart Mountain) dam, and is diverted at Granite Reef diversion dam into the main canals of the project; thence through a subsidiary system of laterals to the premises ordering the same. When such water arrives within his particular zanjero district or division, the zanjero turns it out of the main canal and oversees its delivery to the land entitled thereto. He also notifies the landowner of the approximate time of its arrival at the land and usually sees

to adjustment of the headgate at the land, that such water may be delivered in the quantity specified, and no more. (R. 10 9;135-146; 232; 271-275). Respondent zanjeros are employed and compensated on a monthly salary basis, with often an additional allowance for housing an automobile operation expense. Of necessity they do not and cannot, work any fixed or specific hours per day, days per week, or weeks per month. Their hours of service are dependent entirely upon the existing water conditions in their particular district or division. During certain months of the year when water demands are heavy they may be on duty many hours more than 40 hours per week. At other seasons of the year when water demands are light or where there is no demand at all, such as the rainy season in the wintertime, their time is largely their own to do with as they please. There is no way of determining at the time the water is used whether the crops grown upon the land will go into Interstate Commerce. That fact often is not known, and cannot be known for many months thereafter.

Petitioner has approximately 200 wells and pumps scattered over its entire project, some of which provide water for irrigation, supplementing that available from surface gravity sources, and other drainage to prevent waterlogging of the project. (R. 148-159; 237; 275-277; 281-282). Of such total, probably 60 or 70 pumps are operated by 60 cycle power, and the balance by 25 cycle power. R. 282). The eight respondents denominated "pump operators" (R. 2), operate and service these pumps.

Respondents denominated "maintenance men" (R. 3), clean and maintain the project canals, laterals

and ditches through which irrigation water is conveyed to the lands of petitioner's shareholders after its diversion from the Sale River. These consist of ordinary day labor (usually Mexicans or Indians), operators of mowing machines and weed burners to clean weed and other growths off of canal and ditch banks, operators of dredging and drag-line machines, carpenters, tractor operators, horse drawn equipment, etc. (R. 128-132; 235-236; 277-278).

Both in the construction of the original, or Roosevelt Dam, by the Federal government, and three dams subsequently constructed on the Salt River by petitioner through private financing, provision was made for the generation of hydro-electric energy. Water released from Roosevelt Dam is utilized in the generatioon of such energy, and further utilized for such purpose in its passage through the lower dams: Horse Mesa, Mormon Flat, and Stewart Mountain, on its passage down the Salt River until its final diversion for irrigation into petitioner's canal system at Granite Reef diversion dam. Even thereafter, some power is generated by such water at suitable points along such canal system. Further electrical energy is generated by a steam and Diesel plant operated by petitioner. (R. 280). The power generated by petitioner's works, either hydro or otherwise, is 25 cycle, and, where 60 cycle power is reuired, must be fed through frequency changers. (R. 280-281). Petitioners power demands are such that, to supplement that available from the sources above enumerated, an additional amount is acquired by purchase from government works located on the Colorado River; under the contract for which, such power is delivered to and received by petitioner on the eastern bank of the Colorado River in Arizona

(R. 280). Petitioner's power, whether developed by its own works or acquired by purchase, is used by it in the operation of project works and sold to individuals, shareholders and otherwise, corporations, irrigation districts, etc.

The employees of petitioner's power department, that is to say, its employees engaged in the operation and maintenance of generating apparatus in power houses (whether at dams or along its canal system), the transmission and utilization of such energy, are not parties to this action and in nowise concerned therein. As previously stated, respondents consist entirely of zanjeros, pump men, and irrigation maintenance men. The theory of respondents' action (rejected by the District Court, but upheld by the Circuit Court), is that respondents are engaged in the production of goods for commerce and within the Fair Labor Standards Act of 1938, for the reason that the irrigation water conducted by them, or through facilities maintained by them, is utilized (not by petitioner but by the farmers who are constituent members of petitioner) in the growing of crops and other products of the soil which may or may not ultimately, through a complex chain of marketing over which neither petitioner nor its shareholders have any supervision or control, find their way into the stream of commerce. Further, in the case of respondent "pump men", that they are engaged in interstate commerce because of the fact, if it be a fact, such respondents "in addition to supplying water to (petitioner's) shareholders, are engaged in bringing electricity into the state." (R. 339). While it is undisputed, and as found by the Circuit Court (R. 339-394), large quantities of the crops produced by petitioner's share-

holders ultimately find their way into commerce, it is likewies a fact that large quantities thereof do not enter into such commerce, but are consumed locally in purely intra-state transactions. (R. 161-162; 258; 310-314).

The District Court found as a fact and concluded as a matter of law (R. 318-321): (1) That respondents, in the performance of the services for petitioner, mentioned in their complaint, were not engaged in commerce or in the production of goods for commerce, or in an occupation necessary to the production thereof, within the meaning of the Fair Labor Standards Act of 1938; (2) That in the carrying on of its business and operations petitioner was a service establishment, the greater part of whose service is in intra-state commerce, by reason of which fact respondents were exempted from the provisions and benefits of said Act; and (3) That such of respondents as are employed by petitioner in the capacity of zanjeros are outside salesmen within the meaning of said Act, and exempt from the provisions and benefits thereof. The judgment of the District Court was that respondents, and each of them, take nothing by said action and that their complaint be dismissed. (R. 321). No evidence was taken in the District Court as to the amount of over-time compensation and liquidated damages to which respondents claimed to be entitled; the evidence being limited entirely to that bearing on the issue whether respondents were engaged in commerce or production of goods for commerce and within the Fair Labor Standards Act of 1938.

From such adverse judgment of the District Court respondents appealed to the Circuit Court of Appeals

for the Ninth Circuit (R. 322), which, after due proceedings had, on June 30, 1944 rendered its decision (R. 332), and Judgment (R. 345), reversing the judgment of the District Court of Arizona. To review such Judment of the Circuit Court of Appeals for the Ninth Circuit, Salt River Valley Water Users' Association, a corporation, petitions this Court to grand certiorari. This Summarized Statement is necessary in the length that we make it in order to properly raise and present the questions to be raised by petitioner herein.

STATEMENT AS TO JURISDICTION

Petitioner contends that this Supreme Court of the United States has jurisdiction to grant certiorari and review the Judgment in this action under the provisions of Sec. 240 Judicial Code, Tit. 28 U.S.C.A. Sec. 347, governing certiorari to Circuit Courts of Appeals of the United States.

QUESTIONS PRESENTED

First: Whether such of respondents as are denominated "zanjeros" and "maintenance men", in the performance of the duties shown by the evidence, are engaged in the production of goods for commerce within the meaning and scope of the Fair Labor Standards Act of 1938, (Act of June 25, 1938, c. 676; 52 Stat. 1060, Tit. 29 U.S.C.A. Sec. 201-219), under the definition of "Produced" as given in Section 3 (j) of said Act, reading as follows:

> "(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of

> this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

by reason of the fact that irrigation water conducted to the premises of members of petitioner water users' association by, or through facilities maintained by, such respondents is utilized by such members in the growing of crops, a portion of which may ultimately, through channels unrelated to such members or petitioner, find their way into interstate commerce; or whether, in the performance of such duties said respondents are engaged in a local and intra-state activity not within the purview of said Act.

Second: Whether, considered in conjunction with, or apart from, the state of facts set forth in our first Question Presented, the status of such of respondents as are denominated "pump operators", as being engaged in commerce or in the production of goods for commerce, is in anywise altered by the further fact that a portion of the electrical energy for the operation of such pumps is generated without the State of Arizona.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The decision of the said Circuit Court of Appeals for the Ninth Circuit is contrary to and beyond the

scope of the decision of this Court in the case of Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638, holding that in order for an employee to be deemed engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, the activities and services of such employee must have more than a tenuous relation to such production. That, as shown by the evidence in this cause, the activities of respondents bear not even a tenuous relation to commerce or the production of goods for commerce, but, on the contrary, are purely local and intra-state in character.

The decision of the Circuit Court of Appeals of the United States is contrary to the decision of this Court in the case of *McLeod v. Threlkeld* (319 U. S. 491; 63 S. Ct. 1248-1250) in that maintainance of railroad lines are as much necessary to the production of goods for commerce as furnishing the water for irrigation, as practically all crops referred to as being shipped in Interstate Commerce must be and are shipped by rail, and as the opinion in this case is inconsistent with the opinion of this Court in the McLeod case it should be reversed.

II.

The decision of the said Circuit Court of Appeals for the Ninth Circuit, holding that employees of a water users' association performing duties of the character shown by the evidence in this case, are engaged in commerce or in the production of goods for commerce, involves an important question of Federal law, to-wit: The construction and application of the Fair Labor Standards Act of 1938 to the operations of

water users' associations, irrigation and water conservation districts.

WHEREFORE your petitioner, Salt River Valley Water Users' Association, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 10,618, Charles F. Reynolds, et al., Appellants, vs. Salt River Valley Water Users' Association, a corporation, Appellee"; and that said Judgment of said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation

By .....

CREIG SCOTT
EDWIN D. GREEN
Counsel for Petitioner.

DATED: September 1st, 1944.

Address of Council for Petitioner:
510 Luhrs Tower, Phoenix, Arizona.

CERTIFICATE OF COUNSEL FOR PETITIONER

As a member of the bar of this Court, I hereby certify that I have examined the foregoing petition, and in my judgment it is well founded and not interposed for delay.

.....

GREIG SCOTT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

No opinion was rendered or filed by the District Court of Arizona. The Judgment of said District Court determining the issues in favor of petitioner and against respondents herein, was rendered and filed on September 24, 1943 (R. 318-321).

The opinion of the Circuit Court of Appeals for the Ninth Circuit (Judges Denman, Mathews and Stephens; Judge DENMAN writing), was filed June 30, 1944, and appears at pages 332-344 of the Record. On July 19, 1944, Judge MATHEWS filed a special concurring opinion (R. 344-a-344-b). By such special opinion, Judge MATHEWS concurred in the result, but not in the reasoning of his associates, Judges Denman and Stephens. The Judgment of the Circuit Court of Appeals, however, reversing the District Court of Arizona, was entered on June 30, 1944 (R. 354).

JURISDICTION

The jurisdiction of this Court is invoked under

Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938; Tit. 28 U.S.C.A. Sec. 347). The Judgment of the Circuit Court of Appeals was entered June 30, 1944. No Petition for Rehearing was filed. This petition for writ of certiorari was filed....., 1944, and within three calendar months after the entry of said Judgment of the Circuit Court of Appeals.

The District Court of the United States for the District of Arizona held (R. 318-321): (1) That in the performance by respondents, and each of them, of the services for petitioner, mentioned in their complaint, none of said respondents, during the period of time set forth in said complaint, were engaged in commerce, or the production of goods for commerce, or in an occupation necessary to the production thereof, within the meaning of the Fair Labor Standards Act of 1938; (2) that in the carrying on of its business and operations, as found by said Court, petitioner was a service establishment, the greater part of whose service is in intra-state commerce, and by reason thereof respondents, and each of them, are exempted from the provisions and benefits of said Act; (3) that such of respondents as are employed by petitioner in the capacity of zanjeros are outside salesmen within the meaning of said act, and exempted from the provisions and benefits of said Act.

By its Opinion and Judgment above mentioned, the Circuit Court of Appeals for the Ninth Circuit reversed the District Court upon each of said findings.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made the course of the argument which follows.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and holding that respondents were engaged in the production of goods for commerce within the scope and meaning of the Fair Labor Standards Act of 1938.

2. In reversing the judgment of the District Court and holding that respondent pump operators were engaged in commerce or in the production of goods for commerce within the scope and meaning of said Act, by reason of the fact that a portion of the electrical energy utilized for the operation of such pumps may have been generated without the State of Arizona, and in the performance of such duties, said respondent pump operators were engaged in bringing electricity into the State of Arizona.

SUMMARY OF THE ARGUMENT

POINT A.

RESPONDENTS NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN

SCOPE OF FAIR LABOR STANDARDS ACT OF 1938. (Based on specification of error No. 1).

ARGUMENT

With but one exception (covered under Point B), the Judgment of the Circuit Court of Appeals is grounded upon the proposition that respondents, in the performance of their duties as employees of petitioner, are engaged in the production of goods for commerce within the scope and meaning of the Fair Labor Standards Act of 1938, particularly Section 3 (j) of said Act, defining the term "Produced", as used therein. In arriving at the result which it did in the determination of this case, the Circuit Court of Appeals purported to follow and be guided by this Court's decision in Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638, holding that employees of a landlord renting space to tenants engaged in commerce or in the manufacture of goods for interstate commerce, were within the scope of the Act under consideration.

With the greatest respect for the Ninth Circuit Court of Appeals and the ability of the several members thereof, petitioner feels, in the decision of this case, it overlooked or failed to apply certain highly significant rulings of this Court in the Kirschbaum case, supra. In its opinion in that case this Court held that no hard and fast rule can be laid down in the determination of whether activities of employees, in a given employment, are within or without the scope of the Fair Labor Standards Act; that such determination can only be made upon a consideration of the facts and circumstances of each case as it arises;

that the activities of the employee must have a close and immediate, as distinguished from a tenuous, tie with the process of production for commerce.

Whether or not petitioner is engaged in commerce is immaterial to the issue presented. We are concerned here solely with the activities of the employees parties to this action.

McLeod v. Threlkeld,
319 U. S. 491;
63 S. Ct. 1248, 1250;

Overstreet v. North Shore Corp.,
318 U. S. 125;
63 S. Ct. 494, 498.

Higgins v. Carr Bros. Co.,
317 U. S. 572,
63 S. Ct. 337.

Kirschaum v. Walling,
316 U. S. 517, 524;
62 S. Ct. 1116, 1120;
86 L. Ed. 1638.

Warren-Bradshaw Drilling Co. v. Hall,
317 U. S. 88;
63 S. Ct. 125;
87 L. Ed.....

Directly, neither petitioner nor respondents, its employees, produce any goods or commodities in commerce. It, through the medium of its employees, acts as a delivery instrumentality of irrigation water, the property of its constituent members, to their lands.

None of such irrigation water can be said to go into commerce, unless we adopt the rather extreme reasoning of the writer of the Circuit Court's decision in this case, (with which one member of the Court was unable to agree (R. 344-b)), that vegetables and crops produced contain quantities of such water. The question for determination, therefore, is whether the indirect acts of these respondents in conducting irrigation water to the premises of petitioner's members, or in the maintenance and upkeep of the facilities whereby such delivery is made possible, are engaged in a process or occupation necessary to the production of goods within the meaning of Section 3 (j) of the Fair Labor Standards Act.

Respondents are employees of petitioner, not of its constituent members, shareholders, landowners, or whatever they may be called, and, unless long standing rules regarding separate corporate entity are to be discarded, cannot be deemed employees of the latter. When irrigation water is delivered by petitioner to the lands of its members, its jurisdiction and control ceases (R. 143). It has no voice in the use made thereof by the shareholder, the crops, if any, grown by him thereby, or in the dispostion of such crops when grown:—whether consumed by the shareholder, sold and consumed in local commerce, or turned into the stream of interstate commerce. Although quantities of the products of the soil grown in the Salt River Project find their way into commerce, on the other hand, much thereof is consumed locally. (R. 161-162; 258; 310-314). No one, least of all petitioner herein, can say whether water delivered to a particular farm will produce crops which will ultimately enter into such commerce. (R. 309-310).

The fact that the activities of respondents may "affect interstate commerce" is not, under the unbroken line of decisions of this Court, sufficient to bring them under the Act in question. (see cases previously cited).

Petitioner, in applying for certiorari in this case, is not unmindful of the rule that no mathematical or rigid formula can be laid down for determining in all cases whether a particular employee is or is not engaged in a process or occupation necessary to the production of goods for commerce. However, if the fundamental constitutional concepts of intra and interstate commerce are to be preserved, purely local employments and activities, such as those of respondents here, must be recognized accordingly. If petitioner's employees who clean ditches and zanjeros who run water down such ditches, are to be deemed engaged in the production of goods for commerce because that water grows crops which may or may not ultimately find their way into commerce, it would appear that the basic concept of "intra" as distinguished from "inter" state commerce, is but a fiction and a theory.

If, as declared by this Court, to have that effect, respondents' activities must have a "close and immediate (as distinguished from a "tenuous") tie with the process of production for commerce, we submit that the evidence fails to establish such connection.

POINT B.

RESPONDENT PUMP OPERATORS NOT ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE

(Based on Specification of Error No. 2)

Insofar as the claim that respondent pump operators are engaged in the production of goods for commerce by reason of the fact that water pumped by them is utilized in the production of crops which may or may not ultimately go into commerce, we adopt our argument under Point A. However, the Circuit Court of Appeals in its determination of this case, (R. 332-344; specifically 339), held that respondent pump operators "in addition to supplying water to appellee's (petitioner's) shareholders, are engaged in bringing electricity into the state." —hence, in interstate commerce. As previously pointed out in the Summary Statement, and uncontradicted in the evidence (R. 277-278), respondent pump operators have nothing whatever to do with either the generation or distribution of electrical energy by petitioner, unless the reasoning of the writer of the Circuit Court's opinion that "whenever these employees switch on the pumps they cause electricity originating outside the State of Arizona, to flow through appellee's (petitioner's) lines", has that effect. If such ruling be correct, then by that fact alone, every man, woman and child in the Salt River Valley of Arizona is engaged in interstate commerce, for none can say whether or not the electrical energy so utilized came from without the State of Arizona. As shown by the evidence (R. 285-286), the power acquired by purchase by petitioner from the United States, is commingled with the much larger quantities generated locally by petitioner's works, hydro, steam or Diesel, and no one can say, in using such power, whether it is an inter or intra-state product. Under the contract between petitioner and the United States, the so-called "out of state power" is

delivered to petitioner's system by the government, or an instrumentality of the government, within the State of Arizona (R. 280, 285).

Under numerous decisions of this Court, whether a particular employee is to be deemed within the scope of the Fair Labor Standards Act is dependent solely upon the duties performed by such employee—not those performed by other employees, or upon the size, nature an dextent of his employer's business. (see cases cited, supra). Such of petitioner's employees as are actually engaged ni the generation, transmission and distribution of electric power are not parties to this proceeding. Petitioner submits that respondent "pump operators", under any reasonable construction of the Act in question cannot be deemed engaged in commerce or in the production of goods for commerce because they flick a switch which may or may not utilize electricity originating without the State of Arizona, or pump water which may or may not grow crops which may or may not ultimately go into interstate commerce. On the contrary, petitioner most earnestly contends that these, as well as all of respondents, are engaged in local and intra-state activities which, although possibly affecting commerce, do not constitute commerce or the production of goods of commerce.

IN GENERAL

If all such classes of labor involved in this case came within the provisions of the Fair Labor Standards Act, then all persons who deal with farmers come within the provisions of the Act. A person who sells the farmer a load of fertilizer, or tools with which the

farmer work, then comes within the provisions of the Act.

The great majority of all crops and other products raised and grown on the farms in the Salt River Valley are shipped by rail. All of the vegetable crops are so shipped for the reason that there is no other method of shipment. We believe that the cook who prepared the meals for the Raliroad Construction Gang (Mc Leod v. Threlkeld, 319 U. S. 491; 63 S. Ct. 1248, 1250;) was engaged in interstate commerce or in an occupation necessary for the productions of goods for commerce, just as much as the Zanjero who directed the running of the water in the case at bar. It is significant that the trial judge in this case thought that it was analogous to, and came within, the provisions of the McLeod v. Threlkeld case in rendering his decision.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a write of certiorari, and thereafter reversing the decision of the Ninth Circuit Court of Appeals herein.

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IN THE

Supreme Court of the United States

OF THE

OCTOBER TERM, 1944

No. 439

SALT RIVER VALLEY WATER USERS' ASSOCIATION,
a corporation,

Petitioner,

vs.

CHARLES F. REYNOLDS, et el,

Respondents.

RESPONDENT'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI.

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303 U. S. 453; 58 Sp. Ct. Rep. 656.

RESPONDENT'S BRIEF

STATEMENT OF ISSUE

Petitioner, as reasons relied on for allowance of the writ of certiorari, complains the Circuit Court of Appeals relied upon the authority of Kirschbaum vs. Walling, 316 U. S. 517; 62 Sp. Ct. Rep. 1116, and submits for the consideration of this Court the rule announced in McLeod vs. Threlkeld (319 U. S. 491, 63 Sp. Ct. Rep. 1248) as relied upon by the Trial Court, should govern the disposition of this case.

The issue, thus raised, involves a study of the facts adduced and established at the trial.

These facts, as summarized by the Circuit Court of Appeals (R. 334-339), and which are not in dispute, are as follows:

> "Appellee operates a water and electric system for the supply of irrigation and power in central Arizona, which consists of five large storage dams, two diversion dams, eight hydro-electric plants, one steam plant, one Diesel plant, 1400 miles of canals and laterals, hundreds of miles of power lines, two hundred deep well pumps, and other plant and equipment necessary for the operation of a water and electric utility. These works extend over a great area; the lands served by appellee's water themselves comprise approximately 250,000 acres. Appellee's investment in power plants approximates $23,000,000. During the twelve months' period in-

volved in this case appellee generated at its power plants 408,779,430 kilowatt-hours of electricity. The power is supplied to copper mining companies for use in their mines.

Appellee obtains the bulk of its water both for irrigation and for the generation of power from the Salt and Verde Rivers. Its shareholders are farmers in the Salt River Valley. They or their predecessors in interest appropriated and so, become entitled to the use of the water in the Salt and Verde Rivers for the irrigation of their lands which would otherwise be arid and unproductive. Prior to the organzation of appellee, this water was distributed to the farmers by a number of canal companies.

Appellee was organized for the purpose of unifying these projects and thus conserving all possible water and distributing it to the farmers more effecively than before. One share of appellee's stock was issued for each acre of land in the project. The stock is appurtenant to the land and passes therewith.

With federal assistance and in furtherance of its purposes appellee has augmented its work and, to harness the water power, has constructed hydroelectric plants for the generation of electricity. The right to the use of the water, however, remains in appellee's shareholders—the farmers in the Salt River Valley who require and are by law entitled to it for the irrigation of their lands—and appellee is charged with the obligation to hold this water for,

and deliver it to them in proporion to their interests subject only to their paying assessments in advance of delivery in order to defray appellee's costs and expenses.

The water, therefore, is allowed to flow only in accordance with the demands of the shareholders, and appellee makes no independent disposition of it. As the water is called for by the shareholders, appellee guides its flow from the rivers and reservoirs through its hydro-electric plants (thereby generating electricity) and on down through the network of canals, laterals and ditches to the shareholders. Thus the demand for, and distribution of, water also determines the production of electricity; in other words, the electricity is generated at the hydro-electric plants only as appellee delivers water to its shareholders. Appellee's water and electric system constitutes a single coordinated enterprise based primarily upon the use of the water of the Salt and Verde Rivers.

To augment this supply, however, appellee pumps underground water into its canals and laterals, and distributes it to the shareholders for irrigation. Appellee's pumps are operated by electricity, a portion of which it receives from out of the state, and the remainder of which it generates.

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Appellee with its 1400 miles of canals and laterals, 5 storage dams, 2 diversion dams, 8 hydro-electric

plants, steam plant, Diesel plant, hundreds of miles of power lines, 200 deep well pumps, and other plants and equipment is not a "service establishment".

Appellee's employees engaged in pumping and directing the flow of water for the irrigation of its shareholders' lands are "engaged in the production of goods" for interstate commerce, since such supplying of water is a 'process' and an "occupation necessary to the production" of such goods as defined in section 3 (j) of the Act. More particularly, appellee's maintenance employees are engaged in maintaining, cleaning, and repairing the canals, laterals, and ditches through which the water flows to irrigate the farms. These employees mow and burn noxious grasses and weeds which, if permitted to grow without restraint, would clog the canals, laterals and ditches and stop the vital flow of water. In their work they operate draglines, bull dozers, dredges, shovels, mowers, burners and other necessary machines. They also perform repair work upon head gates, weirs, and other physical equipment which controls the flow of the water through appelllee's works.

The pump men operate and service the electric pumps which draw from underground the water to be delivered to appellee's shareholders in addition to the water obtained from the Salt and Verde Rivers. Whenever these employees switch on the pumps they cause electricity, including electricity origin-

ating outside the State of Arizona, to flow through appellee's lines. Thus these employees, in addition to supplying water to appellee's shareholders, are engaged in bringing electricity into the state".

The Trial Court, in making its "Findings of Fact" found (R. 320):

"5. That during the period referred to in said complaint, plaintiffs, in this action were employees of defendant association and engaged in work **necessary for the operation and maintenance of the irrigation works of said project operated by the defendant and in the delivery of irrigation water** to the shareholders of defendant association."

The issue, therefore, that Petitioner submits for determination of this Court, is whether all Respondents are engaged in a process or occupation necessary and essential to the production of goods for commerce, and whether the Respondent, Pump Operators, in addition, are "engaged in commerce".

ARGUMENT

PRODUCTION OF GOODS FOR COMMERCE

No cotton, fruit or vegetables, shown to have been moved in interstate commerce from the 250,000 acres, comprising the Salt River Project, would have been produced without irrigation from water produced, impounded, and delivered by the labor of the employees of the

Petitioner Association. The Association, Petitioner herein, was incorporated, organized and is operated as a private corporation. The stockholders are limited to landowners producing cotton, fruit and vegetables, and other crops grown for interstate shipment.

Petitioner's Brief (p 25) states:

> "THE GREAT MAJORITY OF ALL CROPS AND OTHER PRODUCTS RAISED AND GROWN ON THE FARMS IN THE SALT RIVER VALLEY ARE SHIPPED BY RAIL."

All classes of respondents, Maintenance men, Pump operators, and Zanjeros, are employed, engaged and devote their time and labor to the delivery of this water to produce the crops.

Our reply to Petitioner's argument that such employees are not essential and necessary in any process or occupation to the production thereof, is simply that no cotton, fruit or vegetables would be produced and shipped from this project without their labor.

Farm Products were not exempted by the Fair Labor Standards Act.

> "With respect to the power of Congress to protect interstate commerce in the commodities produced there is obviously no difference between coal mined, or stone quarried and fruit and vegetables grown" (Santa Cruz Packing Company vs. Nat'l Labor Board, 303 U. S. 453, 58 Sp. Ct. Rep. 656).

It is noteworthy that limited exemptions to labor in

connection with farm products were granted. Labor **performed by a farmer on a farm,** and labor used in first processing of definite and specific crops, were exempted from the operation of the Act. No such claim, however, is made by the Association that it performs labor on a farm, by a farmer, or are the employees herein engaged in the first processing after their production of any of the defined crops. No exemptions were granted farm co-operatives, or companies organized by farmers for their mutual benefit.[1]

Section 3 (i) defines "goods" to include "articles or subjects of commerce of any character."

COPPER

Four large mining Companies, utilizing the power generated in Petitioner's Hydro-electric system, export from Arizona their entire output of copper. (R 92-94). The power generated by the labor of the employees, respondents herein, produces the copper shipped. The fact the employer is a separate company that generates and sells the power to the mining Company that produces the goods does not exempt the labor. (Kirschbaum vs. Walling, supra). The owners of the loft building, employers of the labor in the Kirschbaum case, were not engaged in the production of the goods that were shipped into interstate commerce.

The Zanjeros and Maintenance men conduct the water

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1. See Interpretative Bulletin of Administrator Wage and Hour Division. p 1 Appendix.

through the canals, that perform the multiple service of generating the power at the same time the water is delivered to the farmer.

This water must be controlled by labor in order to utilize it for the double purpose of serving the land and developing power. The Zanjeros control this water through the canals, while the maintenance men keep the canals and ditches in repair and clean in order that the water may flow through the generators, and on to the farmer.

"ENGAGED IN COMMERCE"

Of the 105 Respondents herein, the 8 employees engaded as Pump Operators are in a class by themselves. The Pump Operators are the only class of employees alleged to be "engaged in commerce" as distinguished from employees employed in a process or occupation necessary and essential to the production of goods for commerce.

The 8 Pump Operators utilize and divert the power coming in over the high power transmission lines from Boulder Dam, on the Nevada side of the Colorado River, through California, into Arizona. This is done when they throw the switches from the power line into the motors operating the electrical driven pumps operated by the Petitioner. (P. 151 R.)

A locomotive engineer that pulls the throtle, releasing the power that drives the train over the rails in interstate traffic is engaged in commerce, and whether the com-

modity comes by rail, or the power that is transmitted by wire, the operator that switches and controls the interstate traffic is "engaged in commerce."

Petitioner complains that if the Pump operators are covered by the Act, then every man, woman and child living in the valley are likewise. The Fair Labor Standards Act covers only employees of the Company "engaged in Commerce", and the Petitioner (R. 63), itself is engaged in commerce in importng the power from Boulder, and utilizing it, through these respondents, in its operations. Every man woman and child are not employees of a Company employing labor under the Fair Labor Standards Act.

The Petitioner is engaged in commerce in purchasing, transmitting by wire and utilizing the electrical power generated outside of Arizona. The employees of the Petitioner actually directing, controlling, and diverting that power so transported over the High Power transmission lines into the motors for which the power is purchased and transmitted are "engaged in commerce" as employees covered by the Fair Labor Standards Act.

Pump Operators Also Produce

These same 8 pump operators ,respondents herein, are engaged in a process and occupation essential to the production of crops shipped, in their capacity of lifting the water produced by their operation of the electrically driven pumps. The water thus produced is turned into the canal system for the irrigation of the land. The stored water impounded from rainfall in the dams and the pump water reclaimed from underground is comingled and used in the production of the crops shipped.

McLeod vs. Threlkeld

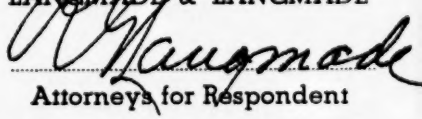
(319 U. S. 491)

McLeod, a cook, was engaged in supplying meals to persons "engaged in commerce". No claim was advanced that McLeod was engaged in a process necessary to the "production of goods for commerce". Respondents herein, and all of them are claiming coverage because of their activities in a process essential to the production of goods. This distinction is clearly established by the record in the instant case. The Circuit Court of Appeals rejected the Petitioner's contention that the rule established in the McLeod vs. Threlkeld applied to the facts in this case, and we submit there is no error justifying the issuance of a Writ of Certiorari.

In view of the supporting authorities cited by the Circuit Court of Appeals in the opinion rendered, we have not encumbered this argument with a repetition thereof.

Respectfully submitted

LANGMADE & LANGMADE



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APPENDIX

INTERPRETATIVE BULLETIN No. 10.
Wage and Hour Division, U. S. Department of Labor.

ADMINISTRATOR'S OPINION—

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Farmers' Cooperative Associations under the Fair Labor Standards Act of 1938.
Issued March 31, 1939.

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"2. The phrase "by a farmer" was intended to cover practices performed either by the farmer himself or by the farmer through his employees. Employees of a farmers' cooperative, however, are employed not by the individual farmers who compose its membership or who are its stockholders, but by the cooperative association itself. Cooperative associations, whether in the corporate form or not, are distinct, separate entities from the farmers who own or compose them. The work performed by a farmers' cooperative association is not work performed by a farmer but for farmers. The legislative history of the Act supports this interpretation. Statutes usually exempt farmers' cooperaive associaions in express terms if an exemption is intended. The omisson of an express exemption from the Fair Labor Standards Act is significant since many unsuccessful attempts were made on the floor of Congress to secure special treatment for such cooperatives. Employees of a farmers' cooperative association, therefore, in our opinion, are not, engaged in "any practices" * * performed by a farmer* * within the meaning of Section 3 (f) and are not exempt on the basis of this part of the definition of "agriculture" from the wage and hour provision of the Act.